1997

State of Utah v. Caprice T. Martin : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. CAPRICE T. MARTIN, Defendant/Appellant.	**APPELLANT'S OPENING BRIEF** Court of Appeal Case # 970501 District Court Case No. 931900803

APPEAL FROM THE JUDGMENT, SENTENCE (COMMITMENT) OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE FRANK G. NOEL AND THE HONORABLE LESLIE LEWIS, JUDGES, PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. CAPRICE T. MARTIN, Defendant/Appellant.	**NOTICE OF CORRECTIONS TO APPELLANT'S OPENING BRIEF** Court of Appeal Case # 970501 District Court Case No. 931900803

On page ii, of the Table of Contents, POINT IV, should read with the following corrections made with "---" through the deleted words:

POINT IV: If, legally, an order was entered prior to the expiration of Defendant's probation on July 6, 1996, and the order was entered within the limits imposed by the legislature ~~and the due process,~~ then:

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(1) Whether, in entering the order, the Court violated the Defendant's procedural due process rights as outlined in the 5th and 14th Amendments of the U.S. Constitution?

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(2) Given that the order was not entered within the requirements of the 5th and 14th Amendment to the U.S. Constitution, whether Defendant's probation terminated before the entry of a valid order of extension?

. 34

On page 3, in the Section entitled, **STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**, POINT IV, should read with the following corrections made with "---" through the deleted words:

POINT IV: If, legally, an order was entered prior to the expiration of Defendant's probation on July 6, 1996, and the order was entered within the limits imposed by the legislature ~~and the due process,~~ then:

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(2) Given that the order was not entered within the requirements of the 5th and 14th Amendment to the U.S. Constitution, whether Defendant's probation terminated before the entry of a valid order of extension?

On page 26, in the Section entitled, **ARGUMENT,** POINT IV, should read with the following corrections made with "---" through the deleted words, and the additional word in [brackets]:

POINT IV: If, [legally], an order was entered prior to the expiration of Defendant's probation on July 6, 1996, and the order was entered within the limits imposed by the legislature ~~and the due process requirement rights of the Utah Constitution~~, then:

(1) Whether, in entering the order, the Court violated the Defendant's procedural due process rights as outlined in the 5th and 14th Amendments of the U.S. Constitution?

(2) Given that the order was not entered within the requirements of the 5th and 14th Amendment to the U.S. Constitution, whether Defendant's probation terminated before the entry of a valid order of extension?

Dated this 30 day of June, 1998

Gregory M. Constantino

CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the foregoing **NOTICE OF CORRECTIONS TO APPELLANT'S OPENING BRIEF** was, this 30 day of June, 1998, mailed first class, postage-prepaid to:

Utah Attorney General's Office
Heber Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

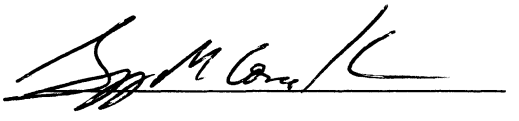

TABLE OF AUTHORITIES

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. CAPRICE T. MARTIN, Defendant/Appellant.	**APPELLANT'S OPENING BRIEF** Court of Appeal Case # 970501 District Court Case No. 931900803

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah R. Crim. Pr. 26(2)(a) and Utah Code Ann. Section 78-2a-3(2)(f)(Supp. 1995), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant was convicted of Robbery, a Second Degree felony, in violation of Utah Code Ann. Section 76-6-301, on May 9th, 1994. Then, Defendant was sentenced to one year to fifteen years in the State penitentiary, with such sentence being suspended and the Defendant being placed on probation. On June 30, 1997, the Defendant's probation was revoked and the suspended sentence was imposed.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

POINT I: Whether the Court's Findings of Facts as to Defendant's knowledge of his rights were clearly erroneous and against the clear weight of the evidence?

STANDARD OF REVIEW: A Trial Courts findings of fact in a criminal case are reviewed under a clearly erroneous standard. State of Utah v. Goodman, 763 P.2d 786, 787 n.2 (Utah 1988). A trial court's finding is clearly erroneous when it is against the clear weight of the evidence. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). However, Deference to the trial court findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached. State v. Genovesi, 871 P.2d 547, 549-51. (Utah App. 1994).

POINT II: Whether the trial court did not have jurisdiction to revoke Defendant's probation at June 27th hearing, given that, legally, no order was entered before Defendant's probation expired by the terms of the order entered January 6, 1995?

STANDARD OF REVIEW: Whether the trial court had the authority to extend Defendant MARTIN'S probation is a question of law. State v. Rawlings, 893 P.2d 1063, 1066 (Utah App. 1995). The Appellate Court accords a trial court's conclusions of law no particular deference, reviewing them for correctness. Id. at 1067.

POINT III: If, legally, an order was entered prior to the expiration of Defendant's probation on July 6, 1996, then:

(1) Whether the order was an invalid extension of Defendant's probation given that the Court did not enter the order extending Defendant's probation within the limits imposed by the legislature?

(2) Given that the extension order was not entered within the limits imposed by the legislature, whether Defendant's probation terminated before the entry of a valid order of extension?

STANDARD OF REVIEW: Whether the trial court had the authority to extend Defendant MARTIN'S probation is a question of law. State v. Rawlings, 893 P.2d 1063, 1066 (Utah App. 1995). The Appellate Court accords a trial court's conclusions of law no particular deference, reviewing them for correctness. Id. at 1067.

POINT IV: If, legally, an order was entered prior to the expiration of Defendant's probation on July 6, 1996, and the order was entered within the limits imposed by the legislature and the due process, then:

(1) Whether, in entering the order, the Court violated the Defendant's procedural due process rights as outlined in the 5th and 14th Amendments of the U.S. Constitution?

(2) Given that the order was not entered within the requirements of the 5th and 14th Amendment to the U.S. Constitution, whether Defendant's probation terminated before the entry of a valid order of extension?

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particular deference, reviewing them for correctness. Id. *at 1067.*

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The full tests of the following determinative constitutional provisions and statutes are reproduced at Appendix A.

A. The Fifth Amendment of the United States Constitution.

B. The Fourteenth Amendment of the United States Constitution.

C. Article 1, Section 7 of the Utah Constitution.

D. Utah Code Section 77-18-1.

E. Utah Rules of Criminal Procedure, Rule 12.

STATEMENT OF THE CASE

A. Nature of the Case.

On May 8, 1997, Defendant CAPRICE MARTIN brought a Motion to Dismiss the case State of Utah v. Caprice Martin, Case no. 9319 00803 FS. (District Court File, pages 187 - 207). The Court held an evidentiary hearing and Mr. MARTIN produced evidence which showed that the Court lost jurisdiction on July 6, 1996, because the Defendant's probation was not legally extended, and thus, expired. (Transcript, May 8, 1997). The Court ruled that Mr. MARTIN's probation was legally extended, and thus, the Court could consider the Order to Show Cause to revoke Defendant's probation and imposed the sentence on the underlying offense. (District Court File, pages 236 - 237). Subsequently, Defendant was convicted before Judge Homer F. Wilkinson, in case no. 9719 00320 FS, of Escape from the

custody of a probation officer, a third degree felony, and assault against a peace officer, a class A Misdemeanor, said crimes occurring on January 14, 1997. Judge Leslie Lewis found that the convictions violated the terms and condition of probation in the case State of Utah v. Caprice Martin, Case no. 9319 00803 FS, revoked probation, and imposed the sentence of one to fifteen year in the State penitentiary. (District Court file, pages 243, 244).

B. Course of the Proceeding.

On May 9, 1994, the District Court, the Hon. Frank G. Noel, presiding, entered judgment, conviction and sentence against the Defendant CAPRICE T. MARTIN. (District Court File, pages 57, 58). The JUDGMENT provided that "Defendant is granted a stay of the above prison sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of 2 years, pursuant to the attached conditions of probation." (District Court File, pages 57, 58).

On December 20, 1994, an AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE was filed by Defendant's probation officer alleging that Mr. MARTIN violated the terms and conditions of his probation. (District Court File, pages 65, 66). Also, a Progress/Violation Report was filed by Adult Probation and Parole. (District Court File, pages 65 -67). On January 6, 1995, the Defendant admitted allegations 1, 3, & 4, of the Order to Show Cause filed on December 20th, and allegation #2 was dismissed. (District Court File, pages 72-73). The Court found that Mr. MARTIN violated the terms of his probation and Mr. MARTIN's probation was revoked and reinstated for 18 months running from January 6, 1995. (District Court File, pages 72-73).

On May 28, 1996, a "Progress/Violation Report" was filed with the Court. (District Court File, pages 80 - 83). The Progress/Violation Report is signed by Glade Anderson,

Probation Officer, and Patricia Dennis, Supervisor. (District Court File, pages 80 - 83) At the end of the Progress/Violation Report, the document has the words, "APPROVED AND ORDERED:". (District Court File, pages 80 - 83, and Exhibit 2) After the words "APPROVED AND ORDERED", Pat Jones, a Court Clerk, wrote the words "/s/ FGN". (District Court File, pages 80 - 83, Transcript May 8th Hearing, pages 20:5 - 22:21) However, there was a copy of the "Progress/Violation Report" signed, after the words "APPROVED AND ORDERED", by Judge Frank G. Noel, and that original was sent Adult Probation and Parole. (Transcript, May 8, 1997, Transcript May 8th Hearing, pages 20:5 - 23:16).

Under the order of January 6, 1995, Mr. MARTIN's Probation terminated on July 6, 1996. (District Court File, page 72).

On September 30, 1996, Probation Officer Sherry Morgan filed an Affidavit in support of Order to Show Cause and Order to Show Cause. (District Court File, pages 84, 85). On October 25, 1996, a hearing was held on the Affidavit. The affidavit alleged that Mr. Martin failed to pay regularly toward his fine, failed to complete substance abuse treatment, and committed the offense of Assault, a Class B misdemeanor, on July 10, 1996. (District Court File, page 84, 85). Mr. Martin admitted allegations 1 2, & 3, and allegation number 4 was dismissed. (Transcript, October 25, 1996 and District Court File, pages 91). Probation Officer Morgan argued that Mr. MARTIN's probation should be re-instated, but the Court did not determine disposition until June 27, 1997. Transcript, October 25, 1996, District Court File, pages 91, Transcript of June 27, 1997.)

On March 12, 1997, Mr. MARTIN, by and through his Counsel, filed a Motion to Dismiss the case, State of Utah v. Caprice Martin, Case no. 9319 00803 FS. (District Court File, pages 187 - 207). Pursuant to the Motion to Dismiss counsel for Mr. MARTIN intended to call Pat Jones, the court clerk of Judge Frank Noel, and possibly, Judge Noel himself.

(District Court File, pages 174 - 182). Thus, by Stipulated Motion, the Hon. Frank Noel signed an Order recusing himself form the District Court case. (District Court File, pages 208-209).

C. Evidence established at Evidentiary Hearing on May 8th, 1997.

On May 8, 1997, before the Hon. Leslie Lewis, the Court held an evidentiary hearing Mr. MARTIN produced evidence which showed that the Court lost jurisdiction on July 6, 1996, because Mr. MARTIN'S probation was not legally extended, and thus, expired. (Transcript, May 8, 1997). The evidence was as follows:

In March, 1996, Glade Anderson became the probation officer for CAPRICE MARTIN. (Transcript, May 8th Hearing, 6:4-9). Probation Officer Anderson called CAPRICE MARTIN and sent Mr. MARTIN a letter. (Transcript, May 8th Hearing, 6:4 - 15) In response to the letter, Mr. MARTIN contacted Anderson. (Transcript, May 8th Hearing, 6:4 - 15). Officer Anderson first met Mr. MARTIN on May 21, 1996. (Transcript, May 18th Hearing, 7:3 - 24).

At the May 21st meeting, Probation Officer Anderson showed Mr. MARTIN the waiver form, (See District Court File, page 82), which was the third page of Exhibit 3. (Transcript, May 8th Hearing, page 7:19 - 8:14). Probation Officer Anderson did not show Mr. MARTIN the Progress/Violation Report, or discuss the contents of the Progress/Violation Report which is found in the District Court File, at pages 82, 83. (Transcript, May 8th Hearing, page 7:19 - 8:14, and May 8th hearing, Exhibit 2, pages 1,2)[1]

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[1] Exhibit 2 is the same as pages 80, 81, and 82 of the District Court file. The Discription of Evidence Card, page 223, shows that the Court received and admitted Exhibit 2, and ordered that

The Waiver Form states that "I Caprice Martin . . . do hereby voluntarily request that my personal appearance before the Third District Court be waived and that my probation supervision be extended; AND/OR that the conditions of my probation be amended as follows:" (District Court File, page 82, and Exhibit 2 from May 8th hearing, page 3). Then, the document continues in handwritten language that "Probation extended 12 months from July 6, 1996, for payment of remaining fine balance and completion of substance abuse counseling." (District Court File, page 82, and Exhibit 2 from May 8th hearing, page 3).

Before signing the Waiver form, Mr. MARTIN was never made aware that he had the right to receive advice from an attorney. (Transcript of May 8th Hearing, 13:13 -18). Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to require the probation office to show probable cause before he could be held on a hearing for violation of his probation. (Transcript of May 8th Hearing, 13:19 - 23). Before signing the Waiver form, Mr. MARTIN was never advised that he was entitled to a neutral officer making a determination of whether probable cause existed that Mr. MARTIN violated his probation. (Transcript of May 8th Hearing, 13:19 - 14:4). Before signing the Waiver Form, Mr. MARTIN was never informed that Adult Probation and Parole had the burden of proof to show that he willfully violated his probation. (Transcript of May 8th Hearing, 14:5 - 14:9). Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to speak out and present evidence in his own behalf at a probation revocation hearing. (Transcript of May 8th Hearing, 14:10 - 14)

Probation Officer Anderson testified that, at the May 21st meeting, Mr. MARTIN was never shown an Order to Show Cause or Affidavit asserting that Mr. MARTIN violated the

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it be placed in the file. Exihibit 2 is the same as Exhibit 3 except that Exhibit 2 is signed "/s/FGN" while Exhbit 3 has Judge Noel's signature and was sent to AP & P and never filed.

terms of his probation. (Transcript of May 8th Hearing, 7:25 - 8:11, 13:9 - 13). The only persons in attendance at the May 21st meeting were Glade Anderson and CAPRICE MARTIN. (Transcript of May 8th Hearing, 10:12 - 15). On May 21, 1996, the only probation condition that had not yet been met was the verification of payment of the fine and verification of substance abuse counseling. Everything else was done. (Transcript of May 8th Hearing, 9:14-19).

Mr. MARTIN'S previous probation officer had focused on the other requirements of his probation, such as the requirement of achieving a G.E.D., and attending a cognitive thinking course. (Transcript of May 8th Hearing, 9:14 - 12:20). Officer Anderson testified that a probation officer never gives one probationer too many things to do at one time. (Transcript of May 8th Hearing, 11:12 -12:20) A probation officer is trained to stagger the requirements of probation. (Transcript of May 8th Hearing, 11:12 -12:20).

On May 21, 1996, Probation Officer Anderson was aware that Mr. MARTIN's probation was scheduled to terminate in July, 1996. (Transcript of May 8th Hearing, 18:1 - 4).

On May 28, 1996, the "Progress/Violation Report" was filed. (District Court File, 80 - 83, and Exhibit 3) The Progress/Violation Report was signed by Glade Anderson and Patricia Dennis, from Adult Probation and Parole. (District Court File, 80 - 83, Transcript of May 8th hearing, 18:21 - 19:18) Neither Glade Anderson nor Patricia Dennis are licensed to practice law. (Transcript of May 8th hearing, 18:21 - 19:18). The document filed in the District Court file on May 28, 1996, was signed by Pat Jones, using the letters, "/s/FGN". Transcript of May 8th hearing, 22:12 - 18) The letters "/s/FGN" were place next to the language "APPROVED AND ORDERED:" on the Progress/Violation Report, at the direction of Judge Noel. (District Court File, 80 - 83, Transcript of May 8th hearing, 20:16 - 24). Besides the Progress/Violation Report, no other evidence was considered by Judge Noel

before he directed his clerk, Pat Jones, to place the letters "/s/FGN" on the Progress/Violation Report. Further, Judge Noel did not make any findings of fact, whether oral or written, on record regarding the Progress/Violation Report filed on May 28, 1996. (Transcript of May 8th hearing, 27:25 - 28:8).

D. Course of Proceedings after the May 8th hearing.

On May 20, 1997, the Court entered its findings of fact and conclusions of law. (District Court File, page 227 - 234). Subsequently, Defendant was convicted before Judge Homer F. Wilkinson, in case no. 9719 00320 FS, of Escape from the custody of a probation officer, a third degree felony, and assault against a peace officer, a class A Misdemeanor, said crimes occurring on January 14, 1997. Judge Leslie Lewis found that the convictions violated the terms and conditions of probation in the case State of Utah v. Caprice Martin, Case no. 9319 00803 FS, and revoked probation, and imposed the sentence of one to fifteen years in the State penitentiary. (District Court file, pages 243 - 248). The order imposing sentence was signed by Judge Lewis on June 30, 1997, and Mr. MARTIN appeals from the entry of that order. (District Court File, pages 243 - 252).

SUMMARY OF THE ARGUMENT

The findings of fact, that Defendant MARTIN knowingly and intelligently waived his rights to allow an extension of probation, are erroneous and against the clear weight of the evidence. The trial court did not have jurisdiction to revoke Defendant's probation at June 27th hearing, given that, legally, no order was entered before Defendant's probation expired by the terms of the order entered January 6, 1995.

Further, the Progress/Violation Report signed by Judge Noel's clerk did not enter the order extending Defendant's probation within the limits of Utah Code Section 77-18-1. Given that the extension order was not entered within the requirements of Utah Code Section 77-18-1, Defendant's probation terminated on July 6, 1996. Thus, all other actions taken by the Court after July 6, 1996, are null and void.

Finally, the Progress/Violation Report signed by Judge Noel's clerk violated the Defendant MARTIN'S procedural due process rights as outlined in the 5th and 14th Amendments of the U.S. Constitution. Given that the extension order was not entered within the requirements of the 5th and 14th Amendments of the U.S. Constitution, Defendant's probation terminated on July 6, 1996. Thus, all other actions taken by the Court after July 6, 1996, are null and void.

For the foregoing reasons, this court should hold that Defendant MARTIN'S probation was not legally extended within the probation period, and the Court lost jurisdiction over the case on July 6, 1996. Thus, this Court should remand this case and order the District Court to vacate the order signed June 30th, 1997, such order revoking Defendant's probation and entering a sentence of one to fifteen years in the State Penitentiary, and this Court should order the District Court to dismiss the case.

ARGUMENT

POINT I: Whether the Court's Findings of Facts as to Defendant's knowledge of his rights were clearly erroneous and against the clear weight of the evidence?

STANDARD OF REVIEW: A Trial Courts findings of fact in a criminal case are reviewed under a clearly erroneous standard. State of Utah v. Goodman, 763 P.2d 786, 787 n.2 (Utah 1988). A trial court's finding is clearly erroneous when it is against the clear

weight of the evidence. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). However, deference to the trial court findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached. State v. Genovesi, 871 P.2d 547, 549-51. (Utah App. 1994).

In the instant case, the Court entered its findings of fact on the record. (Transcript of May 8th Hearing, pages 60:4 - 67:1). The Court found, on the record, that the waiver in this case was voluntary and intelligently made. (Transcript of May 8th Hearing, page 66:9 - 10). This finding is clearly erroneous when it is against the clear weight of the evidence. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

Then, the Court entered a written findings of fact and conclusions of law. (District Court File, pages 227 - 234). The written finding of facts at paragraphs 9 and 10 are not supported by the evidence.

Paragraph 9 of the written findings of fact states:

> "On May 21, 1996, Defendant knew that an Order to Show Cause proceeding would be initiated against him if he failed to sign the Waiver of Personal Appearance, knew that at an Order to Show Cause proceeding he would be entitled at all due process and access to counsel right available to criminal defendants, knew that he would have the right to admit or deny any allegations of such an Order to Show Cause, knew that he would be entitled to an evidentiary hearing at which the state would have to show, upon the evidence, to a preponderance standard, that a probation violation had occurred, and he knew that his probation could be revoked and his original prison sentence entered if a violation was found." (District Court File, pages 227 - 234).

In fact, the evidence offered at the Evidentiary Hearing of May 8th, 1997, does not

support the Court making those factual findings or legal conclusions. The testimony of Probation Officer Glade Anderson was as follows:

"Q: What occurred in that meeting?

A: He [Caprice Martin] came into our office, I had previously talked to him on the phone about some substance abuse classes. He came in, we further talked about him. I had prepared a wavier of appearance before the court. We talked about that. I had discussed him getting involved in some substance abuse classes. To my recollection, I referred him to a counselor to undertake those classes, and at that time he signed the waiver.

Q: Okay. You talked about a progress report. I'm handing you what's to be marked as Defense Exhibit 2. Would you identify Exhibit Number 2?

A: This is the progress violation report sent to Judge Noel outlining the request for the extension of probation, and attached was the waiver of personal appearance.

Q: Is that a true and accurate copy of the document that you showed probationer Caprice Martin on May 21st, 1996?

A: As far as the waiver, yes, I believe it is. I did not show him a copy of the progress violation report.

Q: So then it would be accurate to state that the only document that Caprice Martin saw was that waiver, which is the third page of Exhibit 2?

A: Yes.

Q: Was Caprice Martin shown any other documents before he signed that waiver, which is the third page of Exhibit 2?

A: I don't believe he was.

THE COURT: Let me interject with a question, here. Did you read the probation violation report, the PVA, to him?

THE WITNESS: No, Your honor, I did not.

THE COURT: Did you discuss the contents of it with him?

THE WITNESS: No, we did not.

THE COURT: What did you represent he was waiving by signing the waiver

document?

THE WITNESS: I represented that he was waiving his personal appearance before the court. I believe we talked about an order to show cause, that one would not be required to - -

THE COURT: On what? Did you represent to him what the order to show cause would have been?

THE WITNESS: Failure to compete substance abuse classes.

(Transcript May 8th Hearing, pages 7:3 - 8:24).

Probation Officer Glade Anderson further testified that:

Before signing the Waiver form, Mr. MARTIN was never made aware that he had the right to receive advice from an attorney. (Transcript of May 8th Hearing, 13:13 -18). Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to require the probation office to show probable cause before he could be held on a hearing for violation of his probation. (Transcript of May 8th Hearing, 13:19 - 23). Before signing the Waiver form, Mr. MARTIN was never advised that he was entitled to a neutral officer making a determination of whether probable cause existed that Mr. MARTIN violated his probation. (Transcript of May 8th Hearing, 13:19 - 14:4). Before signing the Waiver Form, Mr. MARTIN was never informed that Adult Probation and Parole had the burden of proof to show that he willfully violated his probation. (Transcript of May 8th Hearing, 14:5 - 14:9). Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to speak out and present evidence in his own behalf at a probation revocation hearing. (Transcript of May 8th Hearing, 14:10 - 14)

Probation Officer Anderson testified that, at the May 21st meeting, Mr. MARTIN was never shown an Order to Show Cause or Affidavit asserting that Mr. MARTIN violated the terms of his probation. (Transcript of May 8th Hearing, 7:25 - 8:11, 13:9 - 13).. On May

21, 1996, the only probation condition that had not yet been met was the verification of payment of the fine and verification of substance abuse counseling. Everything else was done. (Transcript of May 8th Hearing, 9:14-19).

Thus, the Court findings in paragraphs 9 and 10 of the written findings of fact were clearly erroneous and not supported by the evidence. See State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). Further, the Court's findings on the record in the May 8th hearing and in the written findings that Defendant MARTIN'S waiver of was intelligent, knowing and voluntary are not supported by the clear weight of the evidence and are clearly erroneous. See State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

POINT II: Whether the trial court was without jurisdiction to revoke Defendant's probation on June 27, 1997 given that, legally, no order was entered before Defendant's probation expired by the terms of the order entered January 6, 1995?

STANDARD OF REVIEW: Whether the trial court had the authority to extend Defendant MARTIN'S probation is a question of law. State v. Rawlings, 893 P.2d 1063, 1066 (Utah App. 1995). The Appellate Court accords a trial court's conclusions of law no particular deference, reviewing them for correctness. Id. at 1067.

The record shows, that by order of the Court, Mr. MARTIN's probation was revoked and reinstated for 18 months running from January 6, 1995. (District Court File, pages 72-73). The Court must commence proceedings to extend, modify, or revoke probation and must serve notice of those proceedings on Defendant before his probation expires, in order to

extend, modify, or revoke probation. Smith v. Cook, 803 P.2d 788, 795 (Utah 1990).

Rule 12 of the Utah Rules of Criminal Procedure, requires that:

> "(a) An Application to the Court for an **order** shall be by **motion**. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall **state with particularity** the grounds upon which it is made and shall set forth the relief sought. It may be supported by affidavit or evidence." (Emphasis added.)

In the instant case, the Court did not entertain a "motion" to extend, modify, or revoked Defendant's probation prior to the expiration of Defendant's probation on July 6, 1996. And thus, the Court did not, legally, enter an "order" to extend, modify, or revoke Defendant's probation prior to the expiration of Defendant's probation.

On May 28, 1996, the "Progress/Violation Report" was filed. (District Court File, 80 - 83, and Exhibit 3) The Progress/Violation Report was signed by Glade Anderson and Patricia Dennis, from Adult Probation and Parole. (District Court File, 80 - 83, Transcript of May 8th hearing, 18:21 - 19:18) Neither Glade Anderson nor Patricia Dennis are licensed to practice law. (Transcript of May 8th hearing, 18:21 - 19:18).

This Court has held that the preparation of Motions and Orders constitutes the practice of law. See Board of Commissioners, Utah State Bar v. Peterson, 937 P.2d 1263 (Utah 1997). In this case, the Progress/Violation Report was prepared and signed by probation officers, neither licensed to practice law. However, probation officers are statutorily required to prepare these reports under Utah Code § 77-18-1(10)(b), which states that:

> "The Department of Corrections shall notify the sentencing court and prosecuting attorney in writing in advance in all cases when termination of supervised probation

will occur by law. The notification shall include a probation progress report and complete report of details on outstanding finds, restitution, and other amounts outstanding."

These reports are not motions or orders for the purpose of extending, modifying or revoking probation. See Utah Code § 77-18-1(10)(b). Thus, the most appropriate legal conclusion with regard to the Progress/Violation Report filed in the District Court file on May 28, 1996, is that it is not, legally, an order extending probation but simply a "10(b)" report at the close of probation.

Further reason to conclude that the Progress/Violation Report is a "10(b)" report and not an order is that an "order" must be entered pursuant to a "motion". See Utah Rules of Criminal Procedure, Rule 12(a). Further, Rule 12(c) requires that if there are any factual issues involved in determining a motion, the court shall state its findings on fact on the record. See Utah Rules of Criminal Procedure, Rule 12(c). In the instant case, there are no findings of fact entered on the record.

Finally, Utah Code § 77-18-1(10)(a)(iii) gives the Prosecutor, the victim and the Court the right to make motions to revoke probation. The form of the motion is identified as an "Order to Show Cause". See Utah Code Section § 77-18-1(10)(a)(iii). But, Utah Code Section § 77-18-1 does not contemplate probation officer's making "motion" in the form of Progress/Violation Reports. Instead, pursuant to Utah Code Section § 77-18-1(10)(b), probation officers are to notify prosecutors, who in turn, can file an Order to Show Cause. See Utah Code Section § 77-18-1(10)(b) and 12(b).

Since the Court did not enter an order extending Defendant's probation before Defendant's probation expired by the terms of the order entered on January 6, 1995, and the proceedings to extend Defendant's probation were not commenced before the Court was

without jurisdiction to revoke Defendant's probation and impose the sentence on June 27th, 1997.

An order entered placing a Defendant on probation expires by its own terms unless the Court legally, properly, and constitutionally, enters a subsequent order which revokes, modifies or extends. See Smith v. Cook, 803 P.2d 788, 793 (Utah 1990). Otherwise, "Defendant's would be left in a perpetual state of limbo". State v. Green, 757 P.2d 462, 464 (Utah 1988).

In "order for a court to retain its authority over a probationer who is not actively evading supervision, the probationer must be served with the order to show cause with the period of probation." Smith v. Cook, 803 P.2d 788, 794 (Utah 1990). A probationer is entitled to prior notice of the extension proceedings and a hearing before the court has the authority to extend probation. State v. Rawlings, 893 P.2d 1063 (Utah App. 1995). If no such notice is given and a hearing held, the court lacks authority to extend probation. Id.

In the instant case, the probation revocation proceedings are never properly commenced before the trial court lacks authority to extend Defendant's probation. Thus, the Court attempt to revoke probation and impose Defendant's sentence pursuant to the June 27, 1997 hearing, is null and void. See State v. Rawlings, 893 P.2d 1063, 1071 (Utah App. 1995). For the foregoing reasons, this Court should reverse the order signed by the Court on June 30, 1997, which revoked probation and imposed the one to fifteen year sentence, and on remand, order the district court to dismiss the case.

POINT III: If, legally, an order was entered prior to the expiration of Defendant's probation on July 6, 1996, then:

(1) Whether the order was an invalid extension of Defendant's

probation given that the Court did not enter the order extending Defendant's probation within the limits imposed by the legislature?

(2) Given that the extension order was not entered within the limits imposed by the legislature, whether Defendant's probation terminated before the entry of a valid order of extension?

STANDARD OF REVIEW: Whether the trial court had the authority to extend Defendant MARTIN'S probation is a question of law. State v. Rawlings, 893 P.2d 1063, 1066 (Utah App. 1995). The Appellate Court accords a trial court's conclusions of law no particular deference, reviewing them for correctness. Id. at 1067.

1. Order extending Defendant's probation was not entered within the limits imposed by the legislature.

The power to revoke probation must be exercised within legislatively established limits. State v. Green, 757 P.2d 462, 464 (Utah 1988). The trial Court's power to grant, modify, or revoke probation is purely statutory, and although a trial court has discretion in these matters, the court's discretion must be exercised within the limits imposed by the legislature. Smith v. Cook, 803 P.2d 788 (Utah 1990). The Utah Supreme Court has held that a trial court lacks jurisdiction to revoke probation when it acts outside the scope of its legislative authority. [2]

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[2] Smith v. Cook, 803 P.2d 788, 791 (1990)(*citing* State v. Green, 757 P.2d 462, 464 (Utah 1988); State v. Cowdell, 626 P.2d 487, 488 (Utah 1981).

A. The Court was not presented the "probation extension" question, as required by Utah Code Section 77-18-1, and thus, did not enter a valid order.

The controlling statute is Utah Code § 77-18-1(12)(b), which requires that:

"(i) Upon the **filing of an affidavit** alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or **extension** of probation is justified.

(ii) **If the court determines there is probable cause**, it shall cause to be **served** on the defendant a warrant for his arrest or a **copy of the affidavit and an order to show cause** why his probation should not be revoked, modified, or extended." (Emphasis added.)

Under the statute, after the Court, in considering an affidavit, determines there is probable cause to warrant an extension of probation, then the Court sets a hearing. See Utah Code § 77-18-1(12)(c)(I). "The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing." Utah Code § 77-18-1(12)(c)(I).

The statute further requires the order to show cause inform the defendant of his rights, including: (1) the right "to be represented by counsel at the hearing and to appoint counsel for him if he is indigent"; and (2) the right "to present evidence". Utah Code § 77-18-1(12)(c)(iii) and (iv).

The statute requires the Defendant, at the hearing before the Court, "admit or deny the allegations of the affidavit." Utah Code § 77-18-1(12)(d)(I). If the Defendant's denies the

allegations, then the prosecutor has the burden of proof and must present evidence. Utah Code § 77-18-1(12)(d)(ii). In a probation revocation, modification, or extension hearing, the Court must determine by a preponderance of the evidence that the violation was willful. State v. Peterson, 869 P.2d 989, 991 (Utah App. 1994). A finding of willfulness merely requires a finding that the probationer did not make bona fide efforts to meet the conditions of his probation. Id.

The statute gives the Defendant the right to cross examine witnesses against him and to "call witnesses, appear and speak in his own behalf, and present evidence". Utah Code § 77-18-1(12)(d)(iii).

As the record demonstrates, the above requirements were not met in this case. No affidavit was filed, nor did the Court make a determination the probable cause existed to believe that Mr. MARTIN violated the terms of his probation. (District Court File, pages 80 - 83,). Instead, a "Progress/Violation Report" was filed with the Court. (District Court File, pages 80 - 83). At the end of the Progress/Violation Report the document has the words, "APPROVED AND ORDERED:". (District Court File, pages 80 - 83, and Exhibit 2) After the words "APPROVED AND ORDERED", Pat Jones, a Court Clerk, wrote the words "/s/ FGN". Besides the Progress/Violation Report, no other evidence was considered by Judge Noel before he directed his clerk, Pat Jones, to place the letters "/s/FGN" on the Progress/Violation Report. Further, Judge Noel did not make any findings of fact, whether oral or written, on record regarding the Progress/Violation Report filed on May 28, 1996. (Transcript of May 8th hearing, 27:25 - 28:8).

B. The Court was not presented with a valid wavier, as required by Utah Code Section 77-18-1, and thus, did not enter a valid order.

Attached to the Progress/Violation Report (District Court File, Page 82) was a "WAIVER OF PERSONAL APPEARANCE BEFORE THE COURT."

Utah Code § 77-18-1(12)(a) further provides that:

> "(a)(i) Probation may not be modified or **extended except upon waiver** of a hearing by the probationer or upon a hearing and a finding in Court that the probationer has violated the conditions of probation." (Emphasis Added.)

Thus, this Court must determine what is required to comply with the statute to extend by waiver. In interpreting the meaning of "extended except upon waiver", this Court is to give primary consideration in statutory construction "to give effect to the legislature's intent. To discover that intent, this court looks first to the plain language of the statute. Only when the Statute is ambiguous will this Court seek guidance from the legislative history and policy considerations." State v. Winward, 907 P.2d 1188, 1190 (Utah App. 1995).

This Court considered what was required to extend probation by waiver in State v. Rawlings, 893 P.2d 1063 (Utah App. 1995). In Rawlings, the Court considered whether extension proceedings were conducted in accordance with the provisions of Utah Code § 77-18-1 given that the Defendant was not given proper notice of the hearing. Id. at 1067.

This Court held that a probationer in the State of Utah is accorded a measure of due process at a probation extension proceeding and is thus entitled to the available protections.[3]

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[3] State v. Rawlings, 893 P.2d 1063, 1067 (Utah App. 1995) (*citing* Board of Pardons v. Allen, 482 U.S. 369, 381 (1987), *and* Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 11-12 (1979). In support of its holding the Court of Appeals noted that Utah Code Section 77-18-1(10)(c) created an

Id. In Rawlings, the Court noted that in Smith v. Cook, the Supreme Court stated that because the probationer was not given *notice* of the revocation proceedings before the probation period expired, the Supreme Court held that the trial court lacked the authority to revoke the probationer's probation. Id. at 1068. In Rawlings, the Court analogized that "while Smith involved statutory prerequisites to commencement of a probation *revocation* proceeding, the same analysis is applicable to commencement of probation *extension* proceedings." Id.

Thus, a probationer is entitled to proper notice of the extension proceedings and a hearing before the court has the authority to extend probation. Id. at 1069. "If no such notice is given and a hearing held, the court lacks the authority to extend the probation period because the trial court's discretion to extend probation 'must be exercised within the limits imposed by the legislature.'" Id.

Further, a "Defendant may waive his or her constitutional right to due process. However, 'under the due process clause, [a defendant is] entitled to have [adequate notice] imparted to him [or her]; that he [or she] might make an intelligent and informed decision as to whether to waive his [or her] constitutional right to a . . . hearing." State v. Rawlings 893 P.2d at 1070, *quoting* Worrall v. Ogden City Fire Dep't, 616 P.2d 598, 602 (Utah 1980). Thus, in order for defendant to have effectively waived his due process right to proper notice and a hearing on the extension issues, the waiver must be knowing. Id.

In the instant case, Defendant MARTIN did not receive proper notice of the extension

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expectation on behalf of the probationer of notice of the extension proceedings and a hearing, and that it was that statutory expectation, 10(c), to which due process protection attach. The legislature has amended Utah Code Section 77-18-1(10) and deleted 10(c). However, the expectation of liberty interest is still created by Utah Code Section 77-18-1(12)(b), and thus, the State v. Rawlings analysis still holds valid.

proceedings, did not receive a hearing, and did not enter a knowing and intelligent waiver in front of a neutral detached decision maker. Thus, the waiver was not intelligent and knowing.

At the May 21st meeting, Probation Officer Anderson showed Mr. MARTIN the waiver form, (See District Court File, page 82), which was the third page of Exhibit 3. (Transcript, May 8th Hearing, page 7:19 - 8:14). Probation Officer Anderson did not show Mr. MARTIN the Progress/Violation Report, or discuss the contents of the Progress/Violation Report which is found in the District Court File, at pages 82, 83. (Transcript, May 8th Hearing, page 7:19 - 8:14, and May 8th hearing, Exhibit 2, pages 1,2)

The Waiver Form states that "I Caprice Martin . . . do hereby voluntarily request that my personal appearance before the Third District Court be waived and that my probation supervision be extended; AND/OR that the conditions of my probation be amended as follows:" (District Court File, page 82, and Exhibit 2 from May 8th hearing, page 3). Then, the document continues in handwritten language that "Probation extended 12 months from July 6, 1996, for payment of remaining fine balance and completion of substance abuse counseling." (District Court File, page 82, and Exhibit 2 from May 8th hearing, page 3).

Before signing the Waiver form, Mr. MARTIN was never made aware that he had the right to receive advice from an attorney. (Transcript of May 8th Hearing, 13:13 -18). Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to require the probation office to show probable cause before he could be held on a hearing for violation of his probation. (Transcript of May 8th Hearing, 13:19 - 23). Before signing the Waiver form, Mr. MARTIN was never advised that he was entitled to a neutral officer making a determination of whether probable cause existed that Mr. MARTIN violated his probation. (Transcript of May 8th Hearing, 13:19 - 14:4). Before signing the Waiver Form, Mr. MARTIN was never informed that Adult Probation and Parole had the burden of proof to show that he willfully violated his probation. (Transcript of May 8th Hearing, 14:5 - 14:9).

Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to speak out and present evidence in his own behalf at a probation revocation hearing. (Transcript of May 8th Hearing, 14:10 - 14).

Probation Officer Anderson testified that, at the May 21st meeting, Mr. MARTIN was never shown an Order to Show Cause or Affidavit asserting that Mr. MARTIN violated the terms of his probation. (Transcript of May 8th Hearing, 7:25 - 8:11, 13:9 - 13). The only persons in attendance at the May 21st meeting were Glade Anderson and CAPRICE MARTIN. (Transcript of May 8th Hearing, 10:12 - 15). On May 21, 1996, the only probation condition that had not yet been met was the verification of payment of the fine and verification of substance abuse counseling. Everything else was done. (Transcript of May 8th Hearing, 9:14-19).

Given the facts stated above, Defendant MARTIN did not enter a knowing and intelligent waiver as is required and contemplated by Utah Code § 77-18-1.

2. Defendant's probation terminated before the entry of a valid order extending probation.

In the instant case, the probation revocation proceedings are never properly commenced before the trial court lacks authority to extend Defendant's probation. Thus, the Court attempt to revoke probation and impose Defendant's sentence pursuant to the June 27, 1997 hearing, is null and void. See State v. Rawlings, 893 P.2d 1063, 1071 (Utah App. 1995). For the foregoing reasons, this Court should reverse the order signed by the Court on June 30, 1997, which revoked probation and imposed the one to fifteen year sentence, and, on

remand, order the district court to dismiss the case.

POINT IV: If an order was entered prior to the expiration of Defendant's probation on July 6, 1996, and the order was entered within the limits imposed by the legislature and the due process requirement of the Utah Constitution, then:

(1) Whether, in entering the order, the Court violated the Defendant's procedural due process rights as outlined in the 5th and 14th Amendments of the U.S. Constitution?

(2) Given that the order was not entered within the requirements of the 5th and 14th Amendment to the U.S. Constitution, whether Defendant's probation terminated before the entry of a valid order of extension?

STANDARD OF REVIEW: Whether the trial court had the authority to extend Defendant MARTIN'S probation is a question of law. State v. Rawlings, 893 P.2d 1063, 1066 (Utah App. 1995). The Appellate Court accords a trial court's conclusions of law no particular deference, reviewing them for correctness. Id. at 1067.

"The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process [the U.S. Supreme Court has] inquired into the nature of the individual's claimed interest. Greenhotz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 2, 7, 99 S.Ct., 2100, 2103 (1979).

"To determine whether due process requirements apply in the first place, [the Court] must look not to the 'weight' but to the nature of the interest at stake." Board of Regents v. Roth, 408 U.S. 564, 570-571, 92 S. Ct. 2701, 2705-2706 (1972). This has meant that to obtain a protectable right "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 577, 92 S.Ct. at 2709.

A. Defendant MARTIN'S Liberty Interest which is entitled to Due Process Protections.

The U.S. Supreme Court examined the "nature" of the "liberty interest" involved in parole revocations in the case, Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). The Court notes that "the essence of parole is release from prison before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Id. at 477, 92 S.Ct. at 2598. To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. Id. at 478, 92 S.Ct. at 2598. Thus, the nature of the liberty interest in a parole revocation is that a "[r]evocation deprives an individual, not of absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Id. at 480, 92 S.Ct. at 2600. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the U.S. Supreme Court held that there was no difference in the "liberty interest" for purposes of revoking parole or revoking probation. Id. at 781, 93 S.Ct. at 1759.

In the instant case, the liberty interest is "absolute liberty" as opposed to the "conditional liberty" of parole and probation. On July 6, 1996, Defendant MARTIN'S probation was set to expire. At that time, Defendant MARTIN would no longer have

"conditional liberty", that is liberty "properly dependant on observance of special parole restrictions."[4] Defendant MARTIN would have "absolute liberty to which every citizen is entitled." Id. Thus, part, but not all, of the nature of the liberty interest taken from Defendant MARTIN by the probation extension is that, without the extension, Defendant MARTIN would have thrown off the burdens of "conditional liberty" in favor of "absolute liberty". This Court has held that concerning "probation extensions" as outlined in Utah Code Section 77-18-1, Defendant's had a liberty interest that was entitled to due process protections. See State v. Rawlings, 893 P.2d 1063, 1067 (Utah App. 1995).

Further, by statute, Defendant MARTIN was given other rights before his probation could be extended. These rights include: (1) the right to have the prosecutor file of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation; (2) the right to have the Court determine whether probable cause exists to believe that extension of probation is justified; (3) if probable cause is determined, the right to be served with a copy of the affidavit and an order to show; (4) the right to a hearing, not less than five days after being served with the Order to Show Cause, in which the Order to Show Cause is considered; (5) the right to be represented by counsel at the hearing and to have the Court appoint counsel for the Defendant if he is indigent; (6) the right to present evidence at the hearing; (7) the right to have the prosecutor meet his burden of proof with evidence

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[4] Morrissey v. Brewer, 408 at 480, 92 S.Ct. at 260. The U.S Supreme Court noted that these "special parole conditions" were "typically" restrictions like forbidding parolees to use liquor or to have associations or correspondence with certain categories of undesirable persons. Parolees must seek permission from their parole officers before changing employment, changing living quarters, acquiring or operating a motor vehicle, traveling outside the community, or incurring indebtedness. Additionally, parolees must regularly report to the parole officer. Id. at 478, 92 S.Ct. 2598.

establishing that, by a preponderance of the evidence, the violation of probation was willful; and (8) the right to cross examine witnesses against him and to call witnesses, appear and speak in his own behalf, and present evidence. See Utah Code § 77-18-1(12) and State v. Peterson, 869 P.2d 989, 991 (Utah App. 1994). The above-listed rights, established by statute, create an expectation and it is this statutory expectation to which due process protections attach. See Board of Pardons v. Allen, 482 U.S. 369, 381, 107 S.Ct. 2415, 2422 (1987).

Thus, in the instant case, Defendant's MARTIN'S liberty interest which is entitled to Due Process protections, is both, the right to be free of the restrictions of probation and the rights listed above, number one through eight. Before that liberty interest could be taken from Defendant MARTIN, Defendant MARTIN was entitled to Due Process protections.[5]

B. The procedures Martin is entitled to before losing the above-described liberty interest.

In determining what procedures are necessary to safeguard Defendant MARTIN'S liberty interest, the U.S. Supreme Court has set out three factors which must be considered in this case. Those factors were enunciated in Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct.

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[5] In State v. Rawlings, 893 P.2d 1063 (Utah App. 1995), this Court held that Utah Code Section 77-18-1(10)(c) granted Defendants on probation the right to *a hearing with proper notice* before probation could be extended for good cause shown. Since the Rawlings decision, the legislature has stricken Utah Code Section 10(c) from 77-18-1. However, this does not change the Rawlings analysis because Utah Code Section 77-18-1(12), with a great deal of particularity, grants probationer "a hearing and proper notice" and requires "good cause shown" before probations can be extended.

893 (1976), and they are:

"[1] the private interest that will be affected by the official action;

[2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally,

[3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In Gagnon, the U.S. Supreme Court, in a very similar situation to the instant case, had to determine what were the appropriate procedures to safeguard a probationer's liberty interest in continuing on probation without revocation. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973). In Gagnon, the Court noted that:

"Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." Gagnon, 411 U.S. at 786, 93 S.Ct. at 1761.[6]

Justice Powell, for the unanimous Supreme Court, further writes that "[e]ven though the [probation] officer is not by [his] recommendation [to revoke probation] converted into a prosecutor committed to convict, his role as counselor to the probationer or parolee is then

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[6] quoting *Remington, Newman, Kimball, Melli & Goldstein.* Criminal Justice Administration. Materials and Cases, 910 (1969).

surely compromised. When the [probation] officer's view of the probationer's or parolee's conduct differs in this fundamental way from the latter's own view, due process requires that the difference be resolved before revocation becomes final. Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion - the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community. Id.

In this case, the central question is whether a Defendant's probation should be extended beyond the term previously determined by the Court to be an adequate period of time to rehabilitate the Defendant.

The probationer has an interest in being able to successfully complete probation, be done with the requirements and expenses of rehabilitative classes and constrains on movement and associations, and return to the normal life of "absolute liberty". Society has an interest in ceasing the costs, and the administrative and judicial burdens in supervising another probationer. When a probation officer determines that probation should be extended, his view point is in conflict with that of the probationer, and possibly, society's interest in ceasing the burden of administration.

Thus, given the similar concerns and interests as outlined in Gagnon, the procedures for the extension of probation should be the same as the procedures for revocation of probation as outlined in Gagnon.

In Gagnon, the U.S. Supreme Court required that a neutral detached decision maker preside over two hearings. Gagnon 411 U.S. at 785, 93 S.Ct. 1760-1. One hearing to determine whether probable cause exists to determine that the Probationer violated the terms of his probation. And the Second hearing to determine whether a probationer has in fact acted in violation of one or more conditions of his probation, and then, whether the probationer's

sentence should be imposed or whether he should be returned to probation. Id.

Further, the probationer was entitled to (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) the opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking probation. Id. at 786, 93 S.Ct. 1761-62.[7]

2. Defendant's probation terminated before the entry of a valid order of extension.

A. The Court's non-compliance with the requirements of the Due Process Clause of the U.S. Constitution..

As the record demonstrates, the Gagnon procedural requirements were not met in this case. The record further demonstrates the Trial Court in extending Defendant MARTIN'S

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[7] As outlined in Utah Code § 77-18-1(12), the procedures required for extending probation are the same as the procedures required in Gagnon to revoke probations. See Gagnon, 411 U.S. at 785-6, 93 S.Ct. at 1760-2 and Utah Code § 77-18-1(12). The procedures outlined in Utah Code § 77-18-1(12) are also the same procedures required by Gagnon. This makes sense since most of the conflicts between the probationer and the probation officer are the same in both revocation proceedings and extension proceedings. Further, many of the concerns that both the probationer has, and society has, are very similar in both extensions and revocations.

probation, did not comply with the procedural requirements of the Due Process Clause of the 5th and 14th Amendments of the U.S. Constitution.

No affidavit was filed. Also, the Court did not determine that probable cause existed to believe that Mr. MARTIN violated the terms of his probation. (District Court File, pages 80 - 83,). Instead, a "Progress/Violation Report" was filed with the Court. (District Court File, pages 80 - 83). At the end of the Progress/Violation Report the document has the words, "APPROVED AND ORDERED:". (District Court File, pages 80 - 83, and Exhibit 2) After the words "APPROVED AND ORDERED", Pat Jones, a Court Clerk, wrote the words "/s/ FGN". Besides the Progress/Violation Report, no other evidence was considered by Judge Noel before he directed his clerk, Pat Jones, to place the letters "/s/FGN" on the Progress/Violation Report. Further, Judge Noel did not make any findings of fact, whether oral or written, on record regarding the Progress/Violation Report filed on May 28, 1996. (Transcript of May 8th hearing, 27:25 - 28:8).

B. Defendant's Martin's ineffective waiver of his Due Process Rights.

Further, the Defendant MARTIN did not knowingly and intelligently waive his Due Process rights under the U.S. Constitution.

Under the Due Process clause, a person is entitled to have the essential information imparted to him so that he can make an intelligent and informed decision as to whether to waive his constitutional right. See Worrall v. Ogden City Fire Department, 616 P.2d 598, 602 (1980)(interpreting the Due Process Clause of the U.S. Constitution.)

Defendant MARTIN did not receive proper notice of the extension proceedings, did not receive the essential information to make an informed decision whether to waive his rights, did

not receive a hearing, and did not receive a neutral decision maker determining whether the waiver was knowing and intelligent at the time it was made.

Gagnon's procedures require: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) the presence of a neutral and detached hearing body or decision maker during the waiver of one's Due Process rights; (4) a full disclosure of Defendant's rights that he is waiving; (4) a written statement by the hearing body or decision maker as to the evidence relied upon and the reasons for extending probation. See Gagnon 411 U.S. at 785-6, 93 S.Ct. 1760-2.

The facts of this case demonstrate that Defendant MARTIN was not given his Due Process rights during the waiver of his Due Process Rights, and thus, the waiver was ineffective.

C. Since the Trial Court did not comply with the procedural requirements of the U.S. Constitution for extending probations, this Court should vacate the sentence imposed at the June 27th hearing.

In the instant case, the probation revocation proceedings are never properly commenced before the trial court lacks authority to extend Defendant's probation. Thus, the Court attempt to revoke probation and impose Defendant's sentence pursuant to the June 27, 1997 hearing, is null and void. See State v. Rawlings, 893 P.2d 1063, 1071 (Utah App. 1995). For the foregoing reasons, this Court should reverse the order signed by the Court on June 30, 1997, which revoked probation and imposed the one to fifteen year sentence, and on remand, order the district court to dismiss the case.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based on the foregoing, this Court of Appeals should determine that Defendant MARTIN'S probation was not legally and constitutionally extended. Thus, by operation of the order of January 6, 1995, Defendant's MARTIN'S probation expired on July 6, 1996. Thus, the Court was without jurisdiction to conduct any further proceedings after July 6, 1996. Any and all revocations, extensions, and modifications, to Defendant MARTIN'S probation after July 6, 1996, are null and void. Thus, this Court should remand this case to the District Court, with an order requiring the District Court to vacate its order signed on June 30, 1997, and to enter and order of dismissal.

REQUEST FOR ORAL ARGUMENT

Oral argument is desired in this case as the issues raised are significant.

Dated this 29 day of June, 1998

Gregory M. Constantino

CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was, this 29 day of June, 1998, mailed first class, postage-prepaid to:

Utah Attorney General's Office
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Appendix A.

A. The Fifth Amendment of the United States Constitution.

B. The Fourteenth Amendment of the United States Constitution.

C. Article 1, Section 7 of the Utah Constitution.

D. Utah Code Section 77-18-1.

E. Utah Rules of Criminal Procedure, Rule 12.

A

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HISTORICAL NOTES

Proposal and Ratification

The first ten amendments to the Constitution were proposed to the Legislatures of the several states by the First Congress on September 25, 1789, and were ratified on December 15, 1791. For the states which ratified these amendments, and the dates of ratification, see Historical Notes under Amendment I.

Amendment V. Grand Jury Indictment for Capital Crimes

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * *

B

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Due Process Clause of Section 1 are set out in this volume and the following volume. See preceding volume for materials pertaining to the Citizenship and Privileges and Immunities Clauses of that section and the volume containing the end of the Constitution for materials pertaining to the Equal Protection Clause of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebel-

lion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

HISTORICAL NOTES

Proposal and Ratification.

This amendment was proposed to the legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, *Arkansas, Florida, North Carolina,* Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 4, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequently ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, *1868, respectively.*

The State of New Jersey expressed support for the amendment on Nov. 12, 1980.

C

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.
Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.
Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.
Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.
C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.
A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.
Key Numbers. — Constitutional Law ⇐ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.
Compiler's Notes. — Laws 1983, Senate Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.
Regulation of right to bear arms.

Prospective application.
The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.
This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.
Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.
C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.
A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.
Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.
Key Numbers. — Constitutional Law ⇐ 82; Weapons ⇐ 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.
Cross-References. — Eminent domain generally, § 78-34-1 et seq.

D

PART 3

DEFENDANTS PLEADING NOT GUILTY BY REASON OF INSANITY

77-16a-301. Mental examination of defendant.

NOTES TO DECISIONS

Constitutionality.

The privilege against self-incrimination does not protect defendants pleading guilty by reason of insanity from examination under this section. However, the prosecution may use information from the examination only to rebut defendants' insanity claims but not to otherwise establish guilt. State v. Herrera, 895 P.2d 359 (Utah 1995).

CHAPTER 17
THE TRIAL

77-17-1. Doubt as to degree — Conviction only on lowest.

COLLATERAL REFERENCES

A.L.R. — When should jury's deliberation proceed from charged offense to lesser-included offense, 26 A.L.R.5th 603.

77-17-7. Conviction on testimony of accomplice — Instruction to jury.

COLLATERAL REFERENCES

A.L.R. — Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact, 33 A.L.R.5th 571.

CHAPTER 18
THE JUDGMENT

(8) While on probation, and as a condition of probation, the defendant:

(a) may be required to perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs;

(v) serve a period of time in the county jail not to exceed one year;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in community service restitution programs, including the community service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

(ix) make restitution or reparation to the victim or victims with interest in accordance with Subsection 76-3-201(4); and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997, shall be required to:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (i) because of:

(A) a diagnosed learning disability; or

(B) other justified cause.

(9) The department, upon order of the court, shall collect and disburse fines, restitution with interest in accordance with Subsection 76-3-201(4), and any other costs assessed under Section 64-13-21 during:

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

(b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection 77-18-1(10).

(10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

(ii) If the defendant, upon expiration or termination of the probation period, owes outstanding fines, restitution, or other assessed costs, the court may retain jurisdiction of the case and continue the defendant on bench probation or place the defendant on bench probation for the limited purpose of enforcing the payment of fines, restitution, including interest, if any, in accordance with Subsection 76-3-201(4), and other amounts outstanding.

(iii) Upon motion of the prosecutor or victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court or why the suspended jail or prison term should not be imposed.

(b) The department shall notify the sentencing court and prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines, restitution, and other amounts outstanding.

(11) (a) (i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12) (a) (i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) (i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) (i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) Restitution imposed under this chapter and interest accruing in accordance with Subsection 76-3-201(4) is considered a debt for willful and malicious injury for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11 U.S.C.A. Sec. 523, 1985.

(14) The court may order the defendant to commit himself to the custody of the Division of Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-12-209(2)(g) are receiving priority for treatment over the defendants described in this subsection.

(15) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative; or

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(16) (a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (17).

(17) (a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

(i) the defendant to wear an electronic monitoring device at all times; and

(ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

History: C. 1953, 77-18-1, enacted by L. 1980, ch. 15, § 2; 1981, ch. 59, § 2; 1982, ch. 9, § 1; 1983, ch. 47, § 1; 1983, ch. 68, § 1; 1983, ch. 85, § 2; 1984, ch. 20, § 1; 1985, ch. 212, § 17; 1985, ch. 229, § 1; 1987, ch. 114, § 1; 1989, ch. 226, § 1; 1990, ch. 134, § 2; 1991, ch. 66, § 5; 1991, ch. 206, § 6; 1992, ch. 14, § 3; 1993, ch. 82, § 7; 1993, ch. 220, § 3; 1994, ch. 13, § 24; 1994, ch. 198, § 1; 1994, ch. 230, § 1; 1995, ch. 20, § 146; 1995, ch. 117, § 2; 1995, ch. 184, § 1; 1995, ch. 301, § 3; 1995, ch. 337, § 11; 1995, ch. 352, § 6; 1996, ch. 79, § 103; 1997, ch. 392, § 2.

Amendment Notes. — The 1995 amendment by ch. 20, effective May 1, 1995, substituted "Subsections 76-3-201(4) and (5)" for "Subsections 76-3-201(3) and (4)" in Subsection (8)(i) and replaced "Chapter 1" with "Chapter 2" in Subsection (15).

The 1995 amendment by ch. 117, effective May 1, 1995, added references to "interest in accordance with Subsection 76-3-201(4)" in Subsections (5)(c), (8)(i), (9)(a), (10)(a)(ii), and (13), deleted a reference to Subsection 76-3-201(3) in Subsection (8)(i), corrected a reference in Subsection (15), and made stylistic changes throughout the section.

The 1995 amendment by ch. 184, effective May 1, 1995, deleted a requirement of a "recommendation from the Department of Corrections regarding the payment of restitution by the defendant" in Subsection (5)(b)(ii); rewrote Subsection (6), making significant stylistic changes, decreasing the time that the presentence investigation must be available before trial, which had been ten days, and adding the possibility of a ten-day period to correct inaccuracies in the report; and added "and disbursement" after "collection" in Subsection (9)(a).

The 1995 amendment by ch. 301, effective May 1, 1995, substituted "the recommended amount of complete restitution" for "pecuniary damages," inserted "as defined in Subsection 76-3-201(4)" twice and inserted "court-ordered" in Subsection (5)(a) and rewrote Subsection (9).

The 1995 amendment by ch. 337, effective May 1, 1995, added "which may include the use of electronic monitoring" at the end of Subsection (8)(f), added Subsections (16) and (17), and corrected a statutory reference in Subsection (15).

The 1995 amendment by ch. 352, effective May 1, 1995, inserted "if the defendant is not represented by counsel" in the first sentence of Subsection (6), substituted "protected" for "private" and "Chapter (2)" for "Chapter (1)" in the first sentence of Subsection (15), added Subsection (15)(e), and made related stylistic changes.

The 1996 amendment, effective April 29, 1996, substituted "protected" for "confidential" in Subsection (5)(d).

The 1997 amendment, effective May 5, 1997, subdivided Subsection (8), made related designation changes, and added Subsection (8)(b).

Compiler's Notes. — Laws 1994, S.J.R. 6 proposed amending Utah Const., Art. I, Sec. 12 and proposed adding a new Sec. 28 to that article. These proposals were approved by the voters, the changes to take effect on January 1, 1995. Laws 1994, ch. 198, which amended this section to add the requirement of a victim impact statement, provides in § 16 that the Legislature intends the act to serve as the implementing legislation of those constitutional amendments.

Coordination clause. — Laws 1995, ch. 184, § 5 directs that the amendments in that act to Subsection (6)(a) of this section shall supersede the amendments to the sme subsection in L. 1995, ch. 352.

Laws 1995, ch. 301, § 6 provides that the amendments in that act to Subsections (5)(b)(ii) and (9)(a) supersede the amendments to the same subsections by ch. 184.

E

der the clearly erroneous standard; (2) reviewing the trial court's ultimate conclusion that Rule 11 was violated and any subsidiary legal conclusions under the correction of error standard; and (3) reviewing the trial court's determination as to the type and amount of sanction to be imposed under the abuse of discretion standard. Barnard v. Sutliff, 846 P.2d 1229 (Utah 1992); Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996).

The determination of whether conduct violates Rule 11 is made on an objective basis. Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996).

Cited in Walker v. Carlson, 740 P.2d 1372 (Utah Ct. App. 1987); State v. Perdue, 813 P.2d 1201 (Utah Ct. App. 1991); Rimensburger v. Rimensburger, 841 P.2d 709 (Utah Ct. App. 1992); Crowther v. Mower, 876 P.2d 876 (Utah Ct. App. 1994).

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Note, Appellate Review of Rule 11 Issues — De Novo or Abuse of Discretion? *Thomas v. Capital Security Services, Inc.*, 1989 B.Y.U. L. Rev. 877.

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Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 339 to 349.

C.J.S. — 71 C.J.S. Pleading §§ 339 to 366.

A.L.R. — Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

Comment Note — General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 A.L.R. Fed. 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 A.L.R. Fed. 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 A.L.R. Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in antitrust actions, 99 A.L.R. Fed. 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556.

Key Numbers. — Pleading ⇐ 287 to 304.

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insuffi-

ciency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990.)

Compiler's Notes. — This rule is similar to Rule 12, F.R.C.P.

Cross-References. — Motions generally, U.R.C.P. 7.

NOTES TO DECISIONS

ANALYSIS

Jurisdiction over the person.

When urging the trial court to exercise personal jurisdiction based only on documentary evidence, a plaintiff must make only a prima facie showing that the trial court has personal jurisdiction over the nonresident defendant in order to proceed to trial on the merits. Anderson v. American Soc'y of Plastic Surgeons, 807 P.2d 825 (Utah 1990), cert. denied, 502 U.S. 900, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991).

Motion for judgment on pleadings.

—Matters outside of pleadings.

——Answers to interrogatories.

Answers to interrogatories are not a part of the pleadings for purposes of judgment on the pleadings and if the court considers them the other party must have the privilege of offering answering affidavits as upon a motion for summary judgment. Securities Credit Corp. v. Willey, 1 Utah 2d 254, 265 P.2d 422 (1953).

——Rights of opposing party.

On review of a motion on the pleadings treated as a motion for summary judgment under Subdivision (c), the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to him. Young v. Texas Co., 8 Utah 2d 206, 331 P.2d 1099 (1958).

Motion for more definite statement.

—Bill of particulars.

A motion for a more definite statement, and not discovery procedures, is the appropriate means of obtaining the information formerly